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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1965

No. 1063

DIANA KEARNY POWELL, *Petitioner*

v.

NICHOLAS KATZENBACH, Attorney General of the United States, HENRY H. PAIGE and JOHN E. POWELL, *Respondents*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

DIANA KEARNY POWELL,
Petitioner pro se
1500 Massachusetts Ave., N. W.
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*Attorney at Law.*

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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# Supreme Court of the United States

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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*To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:*

The Petitioner prays that Writs of Certiorari issue to review the judgments of the United States Court of Appeals for the District of Columbia Circuit, entered December 2,

1965, in Appeal No. 19,285, *Powell* v. *Katzenbach;* and entered December 9, 1965, in Appeal No. 19,547, *Powell* v. *Paige, et al.*

## OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia in each case is unreported.

The opinion in Appeal No. 19,285, *Powell* v. *Katzenbach,* has not yet been officially reported. (1a) It is unofficially reported January 3, 1966, at 94 W.L.R. 1.

The opinion in Appeal No. 19,547, *Powell* v. *Paige, et al.,* has not yet been officially reported. (3a)

## JURISDICTION

This Court has jurisdiction under 28 U.S.C. 1254(1), and under the Constitution of the United States, Article III, Sec. 2, providing for appellate jurisdiction in cases arising under the Constitution and laws of the United States. p. 3.

Review is sought of two judgments of the United States Court of Appeals for the District of Columbia Circuit, as follows:

1. Judgment entered December 2, 1965, in Appeal No. 19,285, *Powell* v. *Katzenbach* (1a)

2. Judgment entered December 9, 1965, in Appeal No. 19,547, *Powell* v. *Paige, et al.,* (3a)

## QUESTIONS PRESENTED

1. Does the discretionary power vested in the Attorney General of the United States extend to arbitrary refusal to prosecute embezzlement of trust funds in custody of a bank in violation of U.S.C. Title 18, Ch. 31, sec. 645, 656, Ch. 47, sec. 1005?

2. May the defense of *res judicata* be interposed as a defense in related civil actions on the basis of a judgment obtained by fraud and misrepresentation by which vested property has been converted from the rightful owner in violation of Amendment 5 of the Constitution of the United States?

## CONSTITUTION, STATUTES

*Constitution of the United States, Amendment 5:*

> No person shall . . . be deprived of life, liberty, or property, without due process of law; . . .

*United States Code, Title 5, sec. 311a:*

> . . . the Attorney General . . . shall have authority to investigate any violation of Title 18 involving government officers and employees.

*United States Code, Title 18:*

*Ch. 1, Sec. 2:*

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal. As amended Oct. 31, 1951, c. 655, secs. 17b, 65 Stat. 717.

*Ch. 31, Sec. 645:*

Whoever, being a United States marshall, clerk, receiver, referee, *trustee,* or other officer of a United States Court, or any deputy, assistant, or employee of any such officer, retains or converts to his own use or to the use of another or after demand by the party entitled thereto, unlawfully retains any money coming into his hands by virtue of his official relation, position or employment, is guilty of embezzlement . . .

*Ch. 31, Sec. 656:*

Whoever, being an officer, director, agent or employee of, or connected in any capacity with any

Federal Reserve bank, member bank, national bank or insured bank, . . . embezzles, abstracts, purloins or willfully misapplies . . . moneys, funds, assets or securities entrusted to the custody or care of such bank, . . .

*Ch. 47, Sec. 1001:*

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry . . .

*Ch. 47, Sec. 1005:*

Whoever makes any false entry in any book, report, or statement of such bank with intent to injure or defraud such bank, or any other company, body politic or corporate, or any individual person . . .

## STATEMENT OF THE CASE

In *Powell* v. *Katzenbach,* Civil Action 207-65, Complaint in the nature of mandamus was brought in the United States District Court for the District of Columbia seeking prosecution by the Attorney General of the United States against a bank and certain others for violation of provisions of the United States Criminal Code set forth in the Complaint, consisting of deliberate misrepresentations of facts of record and the law to aid fraud and embezzlement. RA2-4. Motion to Strike two paragraphs and to Dismiss the Remainder of the Complaint was granted March 8, 1965, on the ground the Complaint was without foundation in fact and the matter within the discretion of the Attorney General. RA2, 10. Timely appeal was taken to the United States Court of Appeals for the District of Columbia Circuit, Appeal No. 19,285, which affirmed the Judgment of the District Court as to the Motion to Dismiss on the ground

the bringing of criminal actions is discretionary with the Attorney General, December 2, 1965. (App. 1).

In *Powell* v. *Paige et al.*, Civil Action 296-65, Complaint for fraud was brought in the United States District Court against persons named in or associated with the matters complained of in *Powell* v. *Katzenbach*. RB2. Motion to dismiss on the ground of res judicata RB2 was granted April 6, 1965. RB9. Timely appeal was taken to the United States Court of Appeals for the District of Columbia Circuit, Appeal No. 19,547, and the Judgment of the District Court affirmed, December 9, 1965. (App. 3).

The factual basis for both these actions was the deliberate misrepresentation and fraud by The National Savings and Trust Company and others, the bank being appointed Successor Trustee in Civil Action 4051-55 of the estate of Diana Kearny Powell, deceased, of a trust set up in her will, Administration No. 12,657, by which it presses false claims against the remainder which are in patent conflict with the provisions of the will and its own position as trustee, by which it has embezzled the remainder estate vested in petitioner, the only remainderman in esse at termination of the trust on September 1, 1958, in violation of her right under Amendment 5 of the Constitution of the United States. This was accomplished by fraudulent misrepresentations to the Court and in Orders of Court drawn by attorneys for the bank and its agents deliberately setting forth patently false statements of fact and law, which were incorporated into the judgments of the Court, the Bank and its agents subsequently relying upon the Judgments so obtained as authority for their fraudulent acts.

Henry H. Paige and John E. Powell have admitted on several occasions that as attorneys for the bank they were responsibile for raising the spurious claims.

## ARGUMENT

### I.

**The question of whether the Attorney General has unlimited discretion arbitrarily to ignore serious violations of the Criminal Code of the United States is a question which has not been, but should be decided by this Court, the violations including corruption and fraud by a Bank and certain judges of United States Courts.**

Title 5 U.S.C. sec. 311a assigns to the Attorney General of the United States the duty of investigating and prosecuting any violation of Title 18 of the United States Code involving Government officers or employees, and provides that any allegations of complaint received by any agency of the Executive Branch of the Government relating to such violations be referred to the Attorney General. Fraud committed by a federally insured bank or its agents, or against property held in the custody of such a bank, comes within the provisions of Title 18. (Pet. 3, 4).

The United States Attorney General has simply ignored the plain facts of record in claiming lack of foundation for the charges.

Petitioner submits that she is not required to make out a complete criminal case in her Complaint in the nature of mandamus to obtain the action of the Attorney General to prosecute a crime that shocks the conscience and brings into disrepute both the banking system and the integrity of the Courts as instruments of justice, by use of the judicial process to perpetrate embezzlement. Petitioner submits that prosecution of flagrant and serious crime is not within the range of discretionary powers, but is controlled by the Statutes.

## II.

**This Court should review the decisions of the Court below holding as res judicata defenses in reliance upon a decision riddled with misstatements of fact and in direct conflict with prior decisions and of well-settled law, by which respondent is deprived of vested property by fraud and embezzlement, in violation of Amendment 5.**

Respondents Henry H. Paige and John E. Powell have admitted raising the spurious question as to distribution, but continue to rely on the decision incorporating their deliberate misrepresentations of fact and law to sustain a false claim depriving petitioner of vested property, in violation of Amendment 5 of the Constitution of the United States.

The limitation on the doctrine of res judicata is defined at 30A *Am. Jur.* at page 399:

> . . . It is generally held that the principles of res judicata may not be invoked to sustain fraud, and that a judgment obtained by fraud or collusion may not be used as a basis for the application of the doctrine of res judicata. *New Orleans* v. *Gaines (New Orleans* v. *Whitney)* 138 U.S. 593, 34 L.ed. 1102, 11 S.Ct. 428; *Welsh* v. *Mandeville,* 1 Wheat. 233, 4 L.ed. 79.

The prior decision upon which Respondents rely, *Powell* v. *National Savings and Trust Co. (Powell* v. *Powell, and Estate of Diana Kearny Powell,* deceased) 111 U.S. App. D.C. 290, 296 F.2d 412, cer. denied 368 U.S. 946, 7 L.ed. 2d 343, 82 S.Ct. 387, rehearing denied 368 U.S. 1005, 7 L.ed. 2d 547, 82 S.Ct. 597, while purporting to follow *Pyne* v. *Pyne,* 81 U.S. App. D.C. 11, 154 F.2d 297, in fact reverses it and the well-settled law.

Detailed analysis of patent misstatements in the Opinion of the Court below upon which Respondents rely as res judicata extends to twenty printed pages, and therefore is not included. This does not include numerous Orders

drawn by Mr. Paige misstating the facts of record by which Petitioner has been deprived of vested property.

Petition submits that this makes a mockery of due process of law and does irreparable damage to the dignity and confidence in the Courts as vehicles of justice which present special and important reasons for review by this Court.

## CONCLUSION

WHEREFORE, Petitioner respectfully prays that a Writ of Certiorari issue to review the Judgments of the United States Court of Appeals for the District of Columbia Circuit entered December 2, 1965, in Appeal No. 19,285, *Powell* v. *Katzenbach;* and entered December 9, 1965, in Appeal No. 19,547, *Powell* v. *Paige et al.*

DIANA KEARNY POWELL,
Petitioner pro se
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*Attorney at Law.*

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,285

DIANA KEARNY POWELL, *Appellant*,

v.

NICHOLAS KATZENBACH,
United States Attorney General, *Appellee*

Appeal from the United States District Court
for the District of Columbia

Decided December 2, 1965

*Miss Diana Kearny Powell*, appellant *pro se*.

*Mr. John C. Eldridge*, Attorney, Department of Justice, with whom *Assistant Attorney General Douglas, Mr. David C. Acheson*, United States Attorney at the time the brief was filed, and *Mr. Alan S. Rosenthal*, Attorney, Department of Justice, were on the brief, submitted on the brief for appellee.

Before BAZELON, Chief Judge, and WASHINGTON and WRIGHT, Circuit judges.

PER CURIAM: Appellant brought an action in the nature of mandamus against the Attorney General of the United States in order to force prosecution of a national bank and certain persons who appellant alleges were parties to a conspiracy in violation of various sections of Title 18 of the United States Code. Upon motion of appellee, the District Court struck two paragraphs of the complaint under Rule 12(f) of the Federal Rules of Civil Procedure, and dismissed with prejudice the remainder of the complaint for failure to state a cause of action. This appeal followed.

It is well settled that the question of whether and when prosecution is to be instituted is within the discretion of

the Attorney General. Mandamus will not lie to control the exercise of this discretion. E.g., *Confiscation Cases,* 74 U.S. (7 Wall.) 454 (1868); *Moses* v. *Katzenbach,* 119 U.S.App.D.C. 352, 342 F.2d 931 (1965), affirming sub nom. *Moses* v. *Kennedy,* 219 F.Supp. 762 (D.D.C. 1963); *Goldberg* v. *Hoffman,* 225 F.2d 463 (7th Cir. 1955); *Pugach* v. *Klein,* 193 F.Supp. 630 (S.D.N.Y. 1961); *United States* v. *Brokaw,* 60 F.Supp. 100 (S.D. Ill. 1945). We will assume, without deciding, that where Congress has withdrawn all discretion from the prosecutor by special legislation, a court might be empowered to force prosecutions in some circumstances. Cf., e.g., *Moses* v. *Kennedy,* 219 F.Supp. at 765; Note, 74 YALE L.J. 1297 (1965). Appellant cites 68 STAT. 998 (1954), 5 U.S.C. § 311a (1958), as such a statute. However, the language of that provision and its legislative history fail to disclose a congressional intent to alter the traditional scope of the prosecutor's discretion. The complaint in its entirety fails to state a cause of action, and we thus need not reach the issue as to whether the striking of two of its paragraphs was warranted. Accordingly, the judgment of the District Court is

*Affirmed.*

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,547

DIANA KEARNY POWELL, *Appellant*,

v.

HENRY H. PAIGE AND JOHN E. POWELL, *Appellees*

Appeal from the United States District Court
for the District of Columbia

Decided December 9, 1965

*Miss Diana Kearny Powell*, appellant *pro se*.

*Mr. Albert E. Brault* for appellees.

Before BURGER, WRIGHT and LEVENTHAL, *Circuit Judges*.

PER CURIAM: The issues raised by this appeal have been before this court in one form or another on several occasions. See *Powell* v. *National Savings and Trust Company*, 111 U.S.App.D.C. 290, 296 F.2d 412, *cert. denied*, 368 U.S. 946 (1961), *rehearing denied*, 368 U.S. 1005 (1962); *Powell* v. *National Savings & Trust Co.*, 114 U.S.App.D.C. 269, 314 F.2d 274 (1963), *cert. denied*, 379 U.S. 920 (1964), *rehearing denied*, 379 U.S. 984 (1965); *Powell* v. *National Savings and Trust Company*, No. 17,658, decided November 19, 1963, *rehearing en banc denied*, January 15, 1964; *Powell* v. *National Savings and Trust Company*, No. 18,292, decided May 19, 1964, *cert. denied*, 379 U.S. 920 (1965). We have carefully considered the record, the briefs and the oral argument of appellant. We find nothing new contained therein which would require a reversal of the District Court's judgment in this case.

*Affirmed.*

# In the Supreme Court of the United States

OCTOBER TERM, 1965

---

No. 1063

DIANA KEARNY POWELL, PETITIONER

*v.*

NICHOLAS KATZENBACH, ATTORNEY GENERAL OF THE UNITED STATES, HENRY H. PAIGE AND JOHN E. POWELL

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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**MEMORANDUM FOR THE RESPONDENT NICHOLAS KATZENBACH, ATTORNEY GENERAL OF THE UNITED STATES, IN OPPOSITION**

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Petitioner seeks review of two completely separate cases decided by the Court of Appeals for the District of Columbia Circuit, in only one of which—*Powell* v. *Katzenbach*, No. 19,285 below (Pet. App. 1a–2a)—the government was involved. In that case, petitioner had filed a complaint seeking the issuance of a writ of mandamus to compel the Attorney General to institute criminal proceedings against a national bank, the bank's attorney, another person, and



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two judges (Pet. App. 1a). She alleged that the bank, its attorney and the other individual had embezzled and converted property (in violation of 18 U.S.C. 645, 656 and 1005) for the purpose of defeating petitioner's remainderman interest under her grandmother's will, and that in litigation concerning the will[1] a judge of the district court and a judge of the court of appeals had knowingly and deliberately misstated the facts and law in aid of the allegedly criminal conduct of the bank and others. The district court dismissed the complaint for failure to state a cause of action, and the court of appeals affirmed (Pet. App. 1a–2a).

The bringing of federal criminal prosecutions is a matter within the discretion of the Attorney General or other government authorities;[2] hence, no action in the nature of mandamus may be maintained to compel the institution of criminal proceedings.[3] In light of these settled principles, it is clear that the courts below were wholly correct in holding that petitioner's

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[1] *Powell* v. *National Savings and Trust Company*, 296 F. 2d 412 (C.A.D.C.), certiorari denied, 368 U.S. 946.

[2] *The Confiscation Cases*, 7 Wall. 454, 457; *United States* v. *Thompson*, 251 U.S. 407, 412–413; *Deutsch* v. *Aderhold*, 80 F. 2d 677, 678 (C.A. 5); *District of Columbia* v. *Buckley*, 128 F. 2d 17, 20 (C.A.D.C.), certiorari denied, 317 U.S. 658; *Clemons* v. *United States*, 137 F. 2d 302, 305 (C.A. 4).

[3] *Goldberg* v. *Hoffman*, 225 F. 2d 463 (C.A. 7); *Milliken* v. *Stone*, 7 F. 2d 397 (S.D.N.Y.), affirmed, 16 F. 2d 981 (C.A. 2), certiorari denied, 274 U.S. 748; *Moses* v. *Kennedy*, 219 F. Supp. 762 (D.D.C.), affirmed, 342 F. 2d 931 (C.A.D.C.); *Pugach* v. *Klein*, 193 F. Supp. 630 (S.D.N.Y.).

complaint against the Attorney General failed to state a cause of action, and that further review is not warranted.

Respectfully submitted.

THURGOOD MARSHALL,
*Solicitor General.*

MARCH 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966

# PETITION FOR REHEARING

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*Respondents,*

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## PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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*To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Petitioner prays for rehearing on intervening circumstances and grounds not previously presented under Rule 58(2) of this Court of the Petition for Writ of

Certiorari to the United States Court of Appeals for the District of Columbia Circuit denied by this Court on April 18, 1966.

## ADDITIONAL CONSTITUTIONAL AMENDMENT, STATUTE INVOLVED

*Constitution of the United States, Amendment 1*, in part:

Congress shall make no law . . . or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

*18 U.S.C. 371:*

If two or more persons conspire . . . to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be . . .

## ADDITIONAL QUESTIONS PRESENTED

1. Whether the matters complained of by petitioner constitute a conspiracy to defraud the United States under 18 U.S.C. 371.

2. Whether arbitrary rejection of petitioner's Complaint deprives her of the effective right of petition, guaranteed by Amendment 1 of the Constitution of the United States.

## INTERVENING CIRCUMSTANCES AND GROUNDS NOT PREVIOUSLY PRESENTED

### I.

### NEW DECISIONS HAVE BEEN RENDERED IN RELATED CASES RELEVANT TO PETITIONER'S COMPLAINT.

The following cases, decided since the filing of Petition sought to be reviewed are relevant to the instant case and should be considered together with it:

1. *Powell v. National Savings and Trust Company*, No. 1154 in this Court, now pending upon petition for writ of certiorari, challenges the authority by which the respondent therein presented claims in conflict with its former trusteeship.

2. *In the Matter of Diana Kearny Powell*, Miscellaneous No. 54-65 in the United States District Court for the District of Columbia, now being appealed, charging respondent (the petitioner herein) with professional misconduct in filing the instant case of *Powell v. Katzenbach.*

### II.

### NEW OVERT ACTS HAVE BEEN COMMITTED EVIDENTIARY OF CONSPIRACY TO DEFRAUD THE GOVERNMENT.

Additional overt acts in furtherance of the alleged conspiracy to defraud by the persons complained of have strengthened petitioner's position.

Henry H. Paige, in claiming $5,000 for his firm for services, on April 27, 1966, in *Lucy Powell v. Diana Kearny Powell et al*, C.A. 4051-55 in the District Court, concealed the fact that this case is now pending on petition for writ of ceritorari in this Court as *Powell v. National Savings and Trust Company*, No. 1154 *supra*. He further deceived the Court below by misrepresenting that the original complaint was a petition by the National Savings and Trust Company as Successor Trustee for construction of the will involved, whereas the original Complaint in fact was brought under the will by the plaintiff therein, now deceased, for appointment of the successor trustee. Benjamin Dulany was present, aiding and abetting, although silent.

Judge Holtzoff, testifying as a witness on January 18, 1966, in Miscellaneous 54-65, *In the Matter of Diana Kearny Powell*, in the United States District Court for the District of Columbia, gave the following perjured testimony, in reference to the original Complaint filed in the instant case, *Powell v. Katzenbach*, notwithstanding the record substantiated the allegations of the Complaint:

> "... I will make this comment, however: That the statements made by the respondent in her complaint are absolutely false.
>
> "Well, I will make the same comment: That the entire paragraph is a statement of falsehoods except the statement that I rendered an oral decision in that action." (Tr. 10-11)

## III.

## THE DEPARTMENT OF JUSTICE HAS RECENTLY REAFFIRMED ITS POSITION THAT DECEPTION OF THE COURT IS WITHIN THE PROVISIONS OF 18 U.S.C. 371.

As recently as the week following denial of certiorari in the instant case, it came to petitioner's attention that the Department of Justice has taken the position that acts similar to those complained of constituted a conspiracy to defraud the United States in violation of 18 U.S.C. 371 in *Raymond Dennis et al., Petitioners v. United States of America*, No. 502 in this Court. Among the numerous authorities cited in the Government's brief, particularly pertinent are:

*United States v. Manton*, 107 F.2d 834 (C.A. 2) certiorari denied 309 U.S. 664, involving a United States judge and excluding bribery as a necessary element of the offense of conspiracy;

*Hammerschmidt v. United States*, 265 U.S. 182, 188, authority that the conspiracy provision includes not only cheating the Government of property or money, but also defeating the lawful functions of government by misrepresentation, chicane or trickery.

## IV.

## PETITIONER HAS BEEN DEPRIVED OF EFFECTIVE EXERCISE OF HER RIGHT TO PETITION FOR REDRESS OF GRIEVANCES GUARANTEED BY AMENDMENT 1 OF THE CONSTITUTION

Petitioner further raises the question that arbitrary and capricious refusal to consider her complaints, each of which is supported by substantial undisputed facts of record and by well-settled case law, violates Amendment 1 of the Constitution of the United States by depriving her of the effective exercise of her right to petition the Government for a redress of grievances guaranteed therein.

## CONCLUSION

**WHEREFORE**, Petitioner respectfully prays that Petition for Writ of Certiorari be granted.

DIANA KEARNY POWELL

1500 Massachusetts Ave., N.W.
Washington, D. C. 20005

*Petitioner pro se*

/

## CERTIFICATE OF GOOD FAITH

I, Diana Kearny Powell, the Petitioner herein and a member of the Bar of the Supreme Court of the United States, hereby certify that the foregoing Petition for Rehearing of Petition for Writ of Certiorari is presented in good faith and not for delay, and that it is restricted to intervening circumstances of substantial effect, or which to the extent that they were available to petitioner, were not previously presented.

Diana Kearny Powell
*Petitioner pro se*

## CERTIFICATE OF SERVICE

I, Diana Kearny Powell, a member of the Bar of the Supreme Court of the United States, hereby certify that service of the foregoing Petition for Rehearing was made upon respondents by delivery of five copies thereof on the 12th day of May, 1966, at the office of the attorneys of record as follows:

Thurgood Marshall, Solicitor General
Department of Justice
Washington, D. C. 20530
for the Hon. Nicholas Katzenbach,
Attorney General

Albert E. Brault, Esq.
1314 - 19th Street, N. W.
Washington, D. C. 20036
for Henry H. Paige and
John E. Powell

Diana Kearny Powell